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Supreme Court of the United States

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

Petitioner

vs.

RICHARD P. LAWSON,

**As Deputy Commissioner of the
United States Bureau of Employees' Compensation,
Sixth Compensation District, et al.,**

Respondents.

BRIEF FOR RESPONDENTS

**GULF FLORIDA TERMINAL COMPANY,
INCORPORATED,**

and

**AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY**

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BRIEF FOR RESPONDENTS
GULF FLORIDA TERMINAL COMPANY,
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AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 205 F 2d 527. The Order of the District Court appealed from appears on page 15 of the record; the District Court filed no opinion.

Jurisdiction

Petitioner invoked the jurisdiction of this Court under 28 USC 1254 (1). The Court granted certiorari on January 4, 1954.

Restatement of the Question Presented

The petitioner herein has claimed as a "widow" under the Longshoremen's and Harbor Workers' Compensation Act, despite a 25 year separation from the deceased employee (initiated by his desertion). During that period of separation, the petitioner entered into a bigamous marriage with another, refused his invitation to "take him back," and expressed her intention never to resume the relationship of husband and wife with the deceased.

The Deputy Commissioner rejected her claim on the finding that "she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death."

The question is the propriety of the Deputy Commissioner's finding under the facts of this case.⁽¹⁾ We believe that the finding was proper and the claim properly rejected.

(1) The facts are all as found by the Deputy Commissioner (R 7-11). The record before him was never brought up. We still consider, as we did in our Brief in Opposition that the Deputy Commissioner's determination of such non-jurisdictional facts is not to be disturbed on appeal if supported by evidence. *Crowell v. Benson*, 285 US 22, 46; 76 L ed 598, 608; *Cardillo v. Liberty Mutual Insurance Co.*, 330 US 469, 477-478; 91 L ed 1028, 1036. *O'Leary v. Brown-Pacific-Maxon*, 340 US 504; 95 L ed 483.

Statute Involved

The statute involved is the Longshoremen's and Harbor Workers' Compensation Act, Sections 901-950, Title 33, United States Code.

Section 902 (16) defines the term "widow" as follows:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

Statement of the Case

The facts are very succinctly stated by the findings of the Deputy Commissioner on pages 7-11 of the Record. As pertinent to the controversy they may be briefly restated as follows:

The petitioner married Otis Thompson in 1921, two months before her 13th birthday. They lived together for less than five years, during which time she had two children. Otis Thompson deserted her in 1925 and they never lived together as man and wife thereafter. They never were divorced. (R 7-8).

In 1926 Otis Thompson began to live with one Sallie Williams, whom he married in 1929. The petitioner married one Jimmy Lewis Fuller in 1940, who divorced her in 1949. In the same year Sallie Williams left Otis Thompson to work in another state, although she visited him from time to time (R 9-10).

On June 15, 1951, Otis Thompson died from an injury received on June 7, 1951, while employed by Gulf Florida Terminal Company, Incorporated (R 7).

Approximately three weeks prior to his injury, the deceased employee called upon the petitioner at the home of their daughter, and while there asked the petitioner if she would "take him back." She refused (R 10). At the time of the deceased employee's death, the petitioner did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife (R 10).

OUTLINE OF ARGUMENT

- I. Introduction—The construction which the court of Appeals for the Fifth Circuit placed on the definition "widow" in Section 2 (16) of the Act.
- II. The purpose of the Act, being to provide for injured employees and those dependent on them for support, does not require an extension of dependency benefits beyond the express terms of the statute.
- III. The reason why the parties were living apart at the time of the decedent's death is determinative of the wife's status.
 - A. History of the statutory provisions in the state workmen's compensation acts from which the Longshoremen's and Harbor Workers' Compensation Act was taken.
 - B. State decisions interpreting dependency provision prior to its adoption into the Longshoremen's and Harbor Workers' Compensation Act by the Congress preclude application of term "widow" to petitioner.
- IV. The analogy of separate maintenance and support cases.
- V. The petitioner's reasons for living apart at the time of death of the decedent required the rejection of her claim by the Deputy Commissioner.

ARGUMENT

I. Introduction—The construction which the Court of Appeals for the Fifth Circuit placed on the definition "widow" in Section 2 (16) of the Act.

The narrow question here involves the construction to be placed on a few words in a federal statute, the Longshoremen's and Harbor Workers' Compensation Act. Those words define the term "widow," and limit the definition to:

"Only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time. (33 USC § 902 (16), emphasis supplied).

The Court of Appeals for the Fifth Circuit has, by a line of decisions which includes this case,⁽²⁾ found that language to be unambiguous; and has determined that a "widow" meets the requirements of the statute only when an original "desertion" by the husband, or other "justifiable cause" for her living apart from him has continued until the time of the decedent's death, uninterrupted or impeded by her own acts in voluntary derogation of the marriage relationship. As the Court of Appeals said in this case, the reason for its decision is to be found in "the precise terms of the statute" (R 25).

⁽²⁾ *Ryan Stevedoring Co. v. Henderson*, 138 F 2d 348 (1943); *American Mutual Liability Insurance Co. v. Henderson*, 141 F 2d 813 (1944); and the instant case *Thompson v. Lawson*, 205 F 2d 527; and *Henderson v. Avondale Marine Ways, Inc.*, 204 F 2d 178 (1953)

The petitioner attacks that line of decisions of the Fifth Circuit⁽³⁾ on two grounds; (1) that the Court of Appeals misinterpreted "the precise terms of the statute"; and (2) that it misunderstood "the spirit and purpose of the Act," to which the court made a passing reference in the first of its decisions, *Ryan Stevedoring Co. v. Henderson*, 138 F 2d 348, 349. We shall first briefly consider the latter of these two propositions.

II. The purpose of the Act, being to provide for injured employees and those dependent on them for support, does not require an extension of dependency benefits beyond the express terms of the statute.

When the constitutionality of modern workmen's compensation legislation was before this Court in 1917-1918, a most persuasive argument advanced to support its constitutionality under the police power was that without it the injured workman was left to bear the greater part of industrial accident loss and

" . . . he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity. . . ."

New York Central R. Co. v. White, 243 US 188, 197; 61 L ed 667, 672.

The Court, in determining constitutionality, referred to this argument several times. Widow and children ought not to be "deprived of their natural support" (at US p 203). It was not arbitrary and unreasonable for the state to impose upon the employer the absolute duty of compensation in money, in the case

⁽³⁾ Without, curiously enough, finding any unanswerable logic in the cases from other circuits on which the petitioner relies. One page (Petitioner's Brief, pp. 8-9) of a fifteen page argument is devoted to an analysis of these cases.

of an employee's death, "to those who were entitled to look to him for support" (at US p. 205). "One of the grounds of [the public] concern with the continued life and earning power of the individual is its interest in the prevention of pauperism. . . ." (at US p. 207). The interest of the state in those dependent on employees "for support" was again referred to in the companion case of *Mountain Timber Co. v. Washington*, 243 US 219, 243; 61 L ed 685, 699.

In dealing with the Longshoremen's and Harbor Workers' Compensation Act in particular, this Court has recognized that—

" . . . within its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States."

Crowell v. Benson, 285 US 22, 40; 76 L ed 598, 606.

And its application to the "relief . . . of dependents" was specifically referred to in *Baltimore & P. S. B. Co. v. Norton*, 284 US 408, 414; 76 L ed 367, 369-370.

Thus it seems abundantly clear that this Court has long understood that the general purpose of such laws, and of this law in particular, is to provide in the case of the death of an employee, for those *dependent*, or entitled so to depend, *on him for support*; and only statutory language which convincingly, clearly and precisely includes other persons would permit an extension of that purpose.

In the absence of such language in this Act, the Congress certainly never intended to provide, under the guise of workmen's compensation, a windfall payment

to one who, while perhaps technically a "widow,"⁽⁴⁾ had long since written off her initial matrimonial venture as a total loss and contracted a bigamous marriage to supplant it. There is no such language in this statute; on the contrary, as the Court of Appeals has decided, the plain language of the statute precludes consideration of the original desertion of the husband, if it was not the cause of the living apart *at the time* of the husband's death.

III. The reason why the parties were living apart at the time of the decedent's death is determinative of the wife's status.

It seems clear, as the Court of Appeals points out (R 25), that the precise language of the statute requires that the status of the parties as of the time of the employee's death be examined in order to determine the reason for their living apart *as of that time*. If there was any ambiguity on this point, it should at once be dispelled by an examination of the history of this provision in workmen's compensation acts.

⁽⁴⁾ She may not even be technically a "widow". Under the Federal Employees' Liability Act (45 USC § 51), which does not attempt a detailed definition of "surviving widow," a wife of a decedent who was living in adultery with another was not held to be a "widow". *Lytle v. Southern Railway-Carolina Division*, 171 S.C. 221, 171 SE 42, cert den 290 US 645, 78 L ed 560, 54 S. Ct. 63. See also *Folk v. U. S.*, 102 F Supp 736, 740, a Federal Tort Claims case under South Carolina wrongful death statute, reversed on other grounds *U. S. v. Folk*, 199 F 2d 889.

A. History of the statutory provisions in the state workmen's compensation acts from which the Longshoremen's and Harbor Workers' Compensation Act was taken.

When in 1911 various of the state legislatures⁽⁵⁾ enacted workmen's compensation acts, none of them contained precisely the language which now appears in Section 2 (16) of the Longshoremen's Act. The Massachusetts Act contained the following provision:

Part II. Section 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

- (a) A wife upon a husband with whom she lives at the time of his death.

Like language was contained in the Michigan statute (Part II, Section 6).

In 1914, the Massachusetts Act was amended to read:

Part II. Section 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

- (a) A wife upon a husband with whom she lives at the time of his death, *or from whom, at the time of his death, the department shall find the wife was living apart for justifiable cause or because he had deserted her.*

⁽⁵⁾ California (Laws 1911, chap. 399); Illinois (Laws 1911, chap. 314); Kansas (Laws 1911, chap. 218); Massachusetts (Laws 1911, chap. 751); Michigan (Laws 1912, P.L.3); Montana (Laws 1909, chap. 67); Nevada (Laws 1911, chap. 183); New Hampshire (Laws 1911, chap. 163); New Jersey (Laws 1911, chap. 95); Ohio (102 Ohio L. 524); Washington (Laws 1911, chap. 74); Wisconsin (Laws 1911, chap. 50). These statutes are collected in Labatt's *Master and Servant*, Second Edition, Volume 5 § 1852, pp. 5520-5644.

(Laws 1914, chap. 708 § 3; added phrase in italics).

The first federal act to follow this language generally was the Federal Employees' Compensation Act adopted in 1916 (39 Stat 742; 5 USC § 751 et seq.). Section 10(H) of that act contained the sentence:

The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death.

Eleven years later this was brought somewhat into line with the Massachusetts Act by the addition of the phrase:

. . . . or living apart for reasonable⁽⁶⁾ cause or by reason of his desertion.
(c. 110, 44 Stat 1086).

Insofar as there is any ambiguity in this provision because of failure to specifically make the phrase "at the time of his death" refer to the addition provided by the 1927 amendment, it will never receive judicial enlightenment.⁽⁷⁾

(6) The words "reasonable cause", rather than "justifiable cause", might well have been chosen in order to demonstrate an intended departure from the well settled judicial construction of "justifiable cause", the words later used in the Longshoremen's Act.

(7) This act is completely commission administered. Schneider says: "There are therefore no court interpretations of the dependency or other provisions of this act, and the Appeal Board not being bound by the rule of stare decisis, it is thought proper to set out here in full the dependency section of the Act, and it is hoped the practitioner's interpretation and application of the Act will conform with that of the Appeals Board as it from time to time expresses its conclusions." (Schneider, *Workmen's Compensation Law*, Vol. 9. § 1990, pp. 660-661).

And the point is unimportant (except to the Employees' Compensation Appeals Board which administers that Act), because when three weeks later the Congress passed the Longshoremen's Act it left no such loose ends, and followed completely the Massachusetts statute by reciting that—

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for *justifiable* cause or by reason of his desertion *at such time*." (Emphasis supplied).

There is therefore in the Massachusetts and the Longshoremen's acts, the same repetition of the words "at the time of his death," or "at such time," for complete clarity.

B. State decisions interpreting dependency provision prior to its adoption into the Longshoremen's and Harbor Workers' Compensation Act by the Congress preclude application of term "widow" to petitioner.

Between the adoption by Massachusetts of the 1914 amendment of the dependency provisions, and the adoption by the Congress in 1927 of the Longshoremen's and Harbor Workers' Act, the Massachusetts statute had been interpreted by the Supreme Court of that state in a manner consistent with the interpretation of the Fifth Circuit in the instant case.

The basic case under the Massachusetts statute is *In Re Newman's Case*, 222 Mass 563, 111 NE 359 (1916). This was a case where the living apart was found to be by the mutual consent of the husband and wife. However, the Court said:

"If we assume that when the deceased and his wife separated several years ago by mutual consent and that such separation was justifiable at that time because he was not earning enough to support his family, it also appears that *at the time of his death* his earnings had nearly doubled and she still continued to live away from him by mutual agreement." (emphasis supplied). (111 NE at 361).

Thus it clearly appears that although the separation might be justifiable (or desertion) at the time of the parting, it is the status at the time of death that counts; and if the living apart at the time of death is by mutual consent, the wife has no claim to compensation.

In *re McDonald*, 229 Mass 454, 118 NE 949, 950, the Court clearly distinguished between—

1. living apart by mutual consent, and
2. living apart through the fault of the wife,

and concluded that neither fell within the statutory requirement.

In 1919 the Michigan Workmen's Compensation Act was amended to agree with the Massachusetts Act,⁽⁸⁾ and shortly thereafter the case of the separated adulterous wife arose. Determining that "the question of dependency" is to be tested by conditions existing at the time of the accidental death of the employee, the court stated:

(8) *Kirkley v. General Baking Co.*, 217 Mich 207, 186 NW 482, decided in 1922, at which time, the Court said, "Massachusetts seems to be the only state in which a similar provision is contained in the Compensation Law". (186 NW at 485).

"Her status in living apart from him was fixed by her on or before 1917, when she married a man with whom she had previously been living in adulterous relations, and continued unaltered to the time of her husband's death."

Kimber v. Michigan Light Co., 229 Mich 663, 203 NW 110, 111, 112.

Meanwhile a similar statutory provision⁽⁹⁾ had received the same construction in Maine, and in a case substantially on all fours with the instant one. This was again a case of an adulterous wife, but this time one who had been deserted; and the Court said of her claim:

"If there were no other facts in the case than her marriage and his desertion, we think the presumption of her dependency could not be overcome by evidence, but is conclusive. *Greenleaf, Ev.* (16th Ed.) vol. 1 § 15; *Nelson's Case*, 217 Mass. 467, 470, 105 N. E. 357, Ann. Cas. 1915c, 862. The fact of whether she was or not actually a member of his family or dependent upon him for support would then be immaterial.

Another fact, however, appears in this case, which we think takes Mabel St. C. Scott out of the class conclusively presumed to be dependent and places her in the class that requires proof, and that is her act of adultery after being deserted by her husband. Her counsel do not deny that by that act she would be precluded from obtaining a divorce on the ground of desertion. We think the

⁽⁹⁾ "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

'(a) A wife upon a husband with whom she lives, or from whom she was living apart for a justifiable cause, or because he had deserted her or upon whom she is dependent at the time of the accident.'

The 1912 Rhode Island Act, as amended in 1917 (Laws 1917, c. 1534, § 3) is similar, but no cases important to the present controversy appear prior to the adoption of the Longshoremen's and Harbor Workers' Act in 1927.

word "desertion" as used in this connection has its usual meaning when used in connection with marital relations. Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the willful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. If the deserted party at any time furnishes just cause for the one deserting refusing to return, or by his or her acts consents to the separation, desertion as a willful and unjustifiable abandonment of one party by the other and as a ground of divorce ceases. *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474; *Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644. Without a conclusive presumption in her favor, *Mabel St. C. Scott*, though she was one of the deceased's next of kin, or even if within the meaning of the act was still a member of his family, has no standing in this case, as it is admitted that she was not dependent upon him in fact."

Scott's Case, 104 Atl 794, 796.

This then was the status of decisions interpreting this section when the Congress adopted it in 1927. Following the recognized rule of statutory construction that Congress will be deemed to have adopted earlier judicial constructions of borrowed state legislation (*Hartford Accident and Indemnity Co. v. Hoage*, 85 F 2d 411, 413, CA DC, 1936, and cases cited),⁽¹⁰⁾ the

(10) This case refers to the fact that in the main the Longshoremen's Act followed the New York Law. The dependency provisions, however, followed the laws of the states referred to above. See citations in note 4 of *Weeks v. Behrend*, 135 F 2d 258, CA DC, 1943.

Because of the applicability of this more specific rule of construction, we believe that the petitioner's effort to apply the *pari materia* argument (Petitioner's Brief, pp. 14-15) is inappropriate. On the Petitioner's improper application of the rule of *pari materia* see *United States v. Stewart*, 311 US 60, 69; 85 L ed 40, 48; 61 S Ct 102.

doctrines of these cases are controlling in the interpretation of the dependency provisions of the Longshoremen's Act.

The cases point out these rules to be applied:

1. The status of the parties at the death of the employee—and regardless of prior relations between them—is the important factor.
2. The reason for living apart at the time of death must be solely the result of the matrimonial misconduct of the husband; it cannot be either the fault of the wife, or by their mutual consent.⁽¹¹⁾
3. A separation which in its inception arose out of the matrimonial misconduct of the husband, will not fall within the terms of the statute if (1) she later indulges in matrimonial misconduct herself, or (2) continues the separation by mutual consent.

IV. The analogy of separate maintenance and support cases.

Before applying these rules to the facts of the instant case, we shall comment briefly on the petitioner's reference to the wife's immunity from marital misconduct once the husband's desertion has occurred. (Petitioner's Brief, pp. 18-21).

In the first place, the use of the phrase "at such time" at the end of the statutory definition presupposes a possible change in circumstances. If nothing

⁽¹¹⁾ *Weeks v. Behrend*, 135 F 2d 258,259, citing Massachusetts, Michigan and Maine cases.

which the wife did, while living apart, could change the status of the desertion or other initial "justifiable cause," then the words "at such time" would have served no purpose.⁽¹²⁾

Thus, in dealing with a statute where changing relationships are necessarily assumed, we cannot relate its meaning to concepts which are necessarily final in character, such as divorce. If any analogy is either necessary or desirable, we suggest a reference to cases dealing with separate maintenance and support.

Such cases hold that the "right to continued separate maintenance may be forfeited by the wife for her misconduct, as, for example, adultery" (*Atkinson v. Atkinson*, 233 Ala 125, 170 So 198, 199, 200; *Gilson v. Gilson*, 121 N.J.Eq. 342, 189 A 370). And in non-support cases, the support order will be vacated because of the subsequent adultery of the wife, even though the original support order was predicated on similar and continuing misconduct on the part of the husband (*Commonwealth ex rel Brobst v. Brobst*, 173 Pa Super 171, 96 A 2d 194-195; *Commonwealth ex rel Crabb v. Crabb*, 119 Pa Super 209; 180 A 902, 903).

V. The petitioner's reasons for living apart at the time of death of the decedent required the rejection of her claim by the Deputy Commissioner.

These are the uncontroverted facts concerning the living apart by the petitioner as of the time of the decedent's death:

(12) The courts should not rewrite the statute even supposing it would serve humanitarian purposes of the act. *Pillsbury v. United Engineering Company*, 342 US 197, 200; 96 L ed 225, 229.

1. In 1940, fifteen years subsequent to her desertion by the decedent and eleven years prior to his death, the petitioner entered into a bigamous marriage with Jimmy Lewis Fuller, who divorced her nine years later (R 8).

2. In 1951, approximately three weeks prior to his injury and four weeks prior to his death, the deceased employee called upon Julia Thompson at the home of their daughter, and asked the petitioner if she would "take him back." She refused (R 10).

3. At the time of the decedent's death, the petitioner did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife (R 10).

It is therefore clearly apparent that, at the time of the deceased employee's death, the petitioner was not living apart from him because of his desertion 25 years earlier. She regarded their relationship as husband and wife as having long-since ended. She had entered into a new marital venture with Fuller, which she must have assumed was effective. There was a marriage ceremony, and she adopted the name of Fuller (R 8-9).

She certainly refused to acknowledge that she was then the wife of the decedent; she not only refused to again resume that relationship, but she had no intention of ever again living with him.

The decedent and the petitioner were living apart in 1951 as the result of the petitioner's actions and intentions, not the decedent's. In 1951 she was living apart because she chose to do so; or at the very least

it was a matter of mutual consent⁽¹³⁾ and agreement between them. She was living apart and liking it; and she cannot now claim the benefit of a statute which assumes that she was a "widow" only if there presently existed a relationship which she had forcefully controverted by her remarriage, a relationship which at the time of decedent's death she would not accept, and which she did not desire ever to accept again.⁽¹⁴⁾

CONCLUSION

It is respectfully submitted that the Deputy Commissioner, the District Court, and the Court of Appeals were right in rejecting the petitioner's claim. At the time of the deceased employee's death, her living apart from him was the result of her own past actions and present intentions, not his. His desertion had continued as a cause of the separation not later than the date when it became an advantage to her—when his absence permitted the marriage to Fuller. At the time of his death it was clearly her purpose to continue the separation forever.

The statute, in requiring an examination of the status of the parties *at the time of death*, necessarily infers that that status will change between the time of separation and the time of death. It did so here; and the 1925 separation, although once within the

(13) *Weeks v. Behrend*, 135 F 2d 258, CA DC, 1943.

(14) States with less restrictive definitions of widow-dependents under workmen's compensation acts arrive at similar results. See, e.g., *Harden v. United States Casualty Co.*, 175 SE 404, 405, Ga Court of Appeals, 1934.

terms of the statute, became prior to 1951 a living apart for which the petitioner was as much responsible as the decedent, or perhaps more so. With the parties in that status, the statute denies her the position of a "widow," and requires the rejection of her claim.

The decision of the Court of Appeals was right, and these respondents respectfully submit that it should be affirmed.

Respectfully submitted,

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